

¹ Technically, Leslie Lee Hosier is the decedent and the claimant is his surviving spouse and sole heir, Kari Hosier. However, for purposes of consistency, the Board will refer to Leslie Lee Hosier as the claimant as that is the label assigned by the ALJ in his Award.

Accordingly, claimant's surviving spouse claim for benefits was precluded by the provisions of K.S.A. 44-501(d)(2).

The claimant's surviving spouse requests review of the ALJ's decision. She alleges respondent failed to meet the necessary evidentiary burdens imposed by K.S.A. 44-501(d)(2), which are required for the admission of any one of the three blood alcohol tests administered following the claimant's motor vehicle accident. Because those test results are inadmissible and because the underlying compensability of the accident and claimant's death are undisputed, claimant's surviving spouse argues that benefits, including temporary total disability, medical and funeral expenses as well as death benefits are due and owing.

Respondent argues it is immune from workers compensation liability, because claimant was intoxicated at the time of the accident and that his intoxication caused or contributed to his death. This contention is based upon the results of three separate blood alcohol tests, each of which were administered within six hours of claimant's motor vehicle accident. Respondent argues that the results of each of those tests were properly admissible at trial and once admitted, the statute, K.S.A. 44-501(d)(2), precludes any claim for benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ has set forth in exceptional detail the facts surrounding this claim and they will not unnecessarily be repeated herein except as required to explain the Board's findings and conclusions.

There is no dispute as to the underlying compensability of this claim. Claimant, Leslie Lee Hosier, was injured in a single vehicle accident on August 7, 2002, while in the course and scope of his employment. Immediately after the accident he was discovered by his brother and another co-worker, lying in a pool of diesel fuel. Emergency personnel were called and he was transported from the scene. Claimant survived the accident, but was hospitalized until September 13, 2002, when he died due to the injuries sustained in the accident. Claimant is survived by his wife, Kari Hosier.

Once the claimant has met his or her burden of proving a right to compensation, the burden of proving an employer's relief from that liability through K.S.A. 44-501(d)(2)(A-

F)(sometimes referred to as the intoxication defense) is upon the employer.² That statute provides in relevant part as follows:

The employer shall not be liable under the workers compensation act where the injury, disability or death was *contributed* to by the employee's use or consumption of alcohol. . . *It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more* . . . The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

- A. There was ***probable cause to believe*** that the employee used, had possession of, or was impaired by the drug or alcohol while working;
- B. the test sample was collected at a time ***contemporaneous with the events establishing probable cause***;
- C. the collecting and labeling of the test sample was performed by a or under the supervision of a licensed health care professional;
- D. the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
- E. the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;³ and
- F. the foundation evidence must establish, ***beyond a reasonable doubt***, that the test results were from the sample taken from the employee. (Emphasis added)

Accordingly, respondent in this action has the burden of proof to satisfy each of the statutory criteria in order to prevail on the intoxication defense. Failure to satisfy any one of the criteria renders the defense inapplicable and compensation is due pursuant to the provisions of K.S.A. 44-510b.

² *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004)(*Foos II*).

³ Because this case involves only the admissibility of blood alcohol samples and the analysis of those samples, this particular element need not be examined or addressed.

In this case, there is no dispute that claimant had been drinking a significant amount of beer on the night before this accident. He began drinking after work with his brother, Rusty Hosier, and when Rusty left to go home at 9:30 p.m., claimant went on to another bar. By this time Rusty testified claimant was “pretty torqued up”.⁴ This reference clearly indicates Rusty believed claimant was drunk.

Likewise, when claimant arrived home between 11:00 p.m. and midnight, his wife, Kari, testified that he was intoxicated and smelled of alcohol. She further testified that while he wasn’t stumbling or slurring his speech, his walk was affected and she knew, from experience, he was drunk. When he got up the next morning at 6:30 a.m. for work, she indicated he seemed fine, his walk was no longer affected and he did not smell of alcohol.

Claimant reported for work that morning at approximately 7:00 a.m. in the company Ford truck. Although there is a factual dispute as to whether claimant picked up a co-worker on the way to work or met both the co-worker and his brother Rusty at respondent’s business, there is no dispute that the two of them did not see claimant consume any alcoholic beverages on the morning of August 7, 2002. Neither of them recalled him smelling of alcohol, nor did they notice him acting any different than normal. Both these individuals did, however, admit that claimant was known to drink in the morning before work. There was a short period of time in the morning while claimant was getting the drilling rig ready for the job that claimant was left alone in a parking lot. However, there is no evidence that anyone saw claimant drinking while he was at the rig during the morning of the accident. Claimant had stopped at approximately 7:30 a.m. to return some tools to another individual, Ernie Hammerschmidt, who testified that claimant acted normally.

After leaving and heading to the work site, claimant was observed driving the drilling rig just moments before his accident. A witness, Robert Staab, testified that he saw nothing unusual in claimant’s behavior in the moments before the wreck. He saw claimant driving by and waved. As he drove the drilling rig past Mr. Staab claimant waved back and continued driving. Mr. Staab testified that he returned to his work but shortly thereafter heard a loud explosion at approximately 8:30 a.m.. Mr. Staab testified that he believed one of the tires on the drilling rig exploded, causing the wreck. The accident reconstruction experts later concluded that the more likely cause of the accident was an over-correction when one of the tires on the rig inadvertently dropped off the roadway onto the shoulder.

Immediately after the crash, Rusty Hosier and a co-worker were driving down the same road in the Ford truck and came upon Mr. Staab. He alerted the two men to the wreck. The three of them drove down the road to the crash site and got out to help the claimant. Rusty Hosier made a dam around the claimant in an effort to keep the diesel fuel away and emergency personnel were called.

⁴ Rusty Hosier Depo. at 10.

Following the accident and while they were waiting for emergency personnel to respond, Rusty Hosier and the co-worker removed several unopened and full cans of beer from the company Ford truck he had been driving and hid them in a ditch. According to Rusty Hosier, this beer was left over from two 12 packs purchased by himself and claimant the night before.

Over the next six hours, claimant was treated at two medical facilities and was interviewed by a Kansas Highway Patrol Officer. During the course of this treatment and interview, claimant's blood was taken on three separate occasions and tested for blood alcohol content. It is the admissibility of each of these test results which forms the basis of this appeal. If any one of the tests is admissible under K.S.A. 44-501(d)(2), then respondent is immune from claimant's claim for benefits, because each of the test results exceeds the statutory presumption of impairment by alcohol.

I. Test No. 1 - Hays Medical Center

Immediately after the accident, claimant was taken from the scene to Hays Medical Center, where he was attended to by Dr. Alina Huang. Dr. Huang noted that claimant exhibited slurred speech, which is not unexpected given the fact that he had a suspected closed head injury. Dr. Huang also noticed an unusual odor, which she thought could be alcohol. When asked, she testified that she was not sure if the odor she noted was alcohol or diesel fuel. Dr. Huang spoke with claimant and he admitted to drinking beer the day before, but when pressed further, she testified that claimant was unable to accurately identify the present date and was somewhat disoriented.

Consistent with her practice when dealing with trauma cases, Dr. Huang ordered a panel of tests including a blood alcohol test. Natalie Spalsbury, the phlebotomist called in to do the "stick" (draw the blood), indicated that she was directed to have the lab perform a "rainbow panel". Ms. Spalsbury was trained in hospital blood-drawing procedures while on the job, and had a total of three years experience at the Hays Medical Center before claimant's accident. She is not licensed or certified by the State of Kansas.

Ms. Spalsbury did not note any smell of alcohol when she was in claimant's presence, but she was aware of the concern regarding alcohol and its involvement in claimant's accident based upon comments made by others in the emergency room and the fact that claimant was involved in a serious vehicular accident. Because of that, Ms. Spalsbury utilized a procedure to obtain the blood samples that did not involve the use of an alcohol swab. She labeled the tubes while in claimant's room, placing the tubes in bags, rolling them up, including the doctor's test requisition and placing the entire package in a pneumatic chute which goes to the lab. Once Ms. Spalsbury placed the tubes in the chute, she had no further contact with the samples.

Clarence Legleiter is a medical technologist for Central Plains Laboratories, the company that provides laboratory services to Hays Medical Center. A medical technologist

must complete a four year bachelor's level degree program followed by a one year internship at a hospital. Hays Medical Center is certified by the American Society for Clinical Pathology.

According to Mr. Legleiter, samples are bar coded and logged in upon receipt through the pneumatic chute. The bar codes reflect the patient, the doctor and the test(s) to be run. Once logged in, the samples are spun on the centrifuge and placed into a machine which performs the requested test(s). The resulting information is downloaded in the computer. Once the results are completed, they are "released" by the medical technologist on duty.

Mr. Legleiter does not recall performing the test on the claimant's blood samples, nor could he confirm that he was the individual who performed the blood test on claimant's blood even after he reviewed the actual test results. He testified that the blood tubes that come down the chute do not come directly to him, but instead go to an individual in the specimen processing unit.

In this instance, the test results from the laboratory at Hays Medical Center indicated a blood alcohol level of 212 mg/dl (milligrams of alcohol per deciliter of blood, or .212 grams of alcohol per 100 milliliters of blood). The test results indicate the blood was drawn at 9:30 a.m. and the results were generated at 10:05 a.m.⁵

1. Probable Cause

The intoxication defense first requires "probable cause" for testing an injured employee.⁶ "'Probable cause' is a phrase which has acquired peculiar and appropriate meaning in the law."⁷ It refers to a quantum of evidence which would lead one to believe that something (for example, that a crime had been committed) is more than a possibility.⁸ The Kansas Supreme Court has recently determined that "probable cause need only occur contemporaneously with the events establishing probable cause."⁹ Thus, the finder of fact is permitted to consider both pre-accident facts as well as those occurring post-accident in determining whether probable cause exists for testing an employee.

⁵ Legleiter Depo., Ex. 1 at 1.

⁶ K.S.A. 44-501(d)(2)(A)(Furse 2000).

⁷ *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004)(*Foos II*).

⁸ *Id.*

⁹ *Id.*

At the time the parties were litigating this claim, the Kansas Court of Appeals had issued its opinion in *Foos*.¹⁰ That opinion recognized what it termed a “normal course of medical treatment exception” to the admissibility of a blood alcohol test under K.S.A. 44-501(d)(2). Thus, when the ALJ considered the admissibility of the first blood alcohol test performed by the laboratory at Hays Medical Center as well as Wesley Medical Center, he concluded no probable cause was necessary because the tests were done in the normal course of claimant’s treatment at those facilities.

However, the Court of Appeal’s opinion was shortly thereafter reversed by the Supreme Court. The Supreme Court made it clear that in order to prevail on the intoxication defense, a respondent can no longer rely upon a hospital’s routine testing to establish intoxication or impairment. It is now established law that the respondent must establish contemporaneous probable cause for the testing in order to rely on the intoxication defense. Such a determination is a question of fact.¹¹ Thus, the Board must now consider whether probable cause existed as a predicate for each of the blood alcohol testing procedures.

The Board has examined the underlying facts surrounding the first blood sample taken at Hays Medical Center and concludes that it is inadmissible under K.S.A. 44-501(d)(2), because there was no showing of probable cause as that term has been defined by our Supreme Court. Reasonable suspicion is considered to be a lesser standard than probable cause.¹²

Claimant was involved in a single vehicular accident which gave rise to serious injuries and led to emergency room “chatter”. While claimant exhibited slurred speech while in the emergency room, Dr. Huang testified that altered speech was not an unexpected condition in one who had sustained a closed head injury. Claimant admitted to Dr. Huang that he was drinking beer the night before his accident, but there is absolutely no evidence that claimant had any alcohol after 11:00 p.m. or midnight the night before. Neither claimant’s wife, brother or co-worker noticed anything unusual about claimant’s behavior or his ability to function and drive in the hour before the accident. Dr. Huang identified an unusual odor about claimant, but given the fact he was found lying in a pool of diesel fuel, an unusual odor is expected. The nature of the accident, that of a tire leaving the road and the driver over-correcting, is not unusual according to Trooper Robert Taylor, who investigated the accident.

When the surrounding facts are viewed in their entirety, the Board finds that there was no probable cause to test claimant’s blood alcohol when he arrived at Hays Medical

¹⁰ *Foos v. Terminix*, 31 Kan. App. 2d 522, 67 P.3d 173 (2003)(*Foos I*).

¹¹ *Foos v. Terminix*, 277 Kan.687, 89 P.3d 546 (2004)(*Foos II*).

¹² *Id.* at 703, 89 P.3d 546, __ (citing *State v. Pritchett*, 270 Kan. 125 Syl. 3, 11 P.3d 1125 (2000)).

Center. Each of the factors that might lead one to conclude he *might* have been intoxicated at the time of the accident can easily be explained or discounted. There is, in the Board's view, an insufficiency of evidence upon which one could conclude that intoxication was more than a possibility. For this reason alone, the test results from Hays Medical Center are inadmissible.

2. Laboratory Qualifications

Independent of the foregoing conclusion, the Board finds there are other insufficiencies within the evidence that would preclude the admissibility of the .212 blood alcohol test result. K.S.A. 44-501(d)(2)(D) requires evidence that the laboratory performing the test analysis be "approved by the United States department of health and human services or licensed by the department of health and environment". As correctly noted by the ALJ, there is no evidence that the laboratory housed within the Hays Medical Center was licensed or approved by the appropriate agency or department. Likewise, there is no evidence that the lab is one that is commonly used by state law enforcement agencies. This failure, standing alone, would prohibit the admittance of the .212 test result from the first blood sample. The ALJ's conclusion on the issue of the laboratory's lack of requisite qualifications is affirmed.

3. Chain of Custody

Similarly, there is a lack of evidence establishing an unbroken chain of custody with respect to the blood samples taken from claimant while he was at Hays Medical Center. The "intoxication defense" compels the respondent to come forward with a foundation of evidence that establishes "*beyond a reasonable doubt, that the test results were from the sample taken from the employee.*"¹³ This evidentiary standard is far more onerous than that normally found in civil proceedings. In fact, in criminal matters issues concerning the chain of custody go to weight rather than admissibility.¹⁴ Here, the statute mandates a finding "beyond a reasonable doubt" that the test result came from the employee's sample. Thus the ALJ was correct when he stated that this statute requires the respondent "prove a clear and unbroken chain of custody on the samples."¹⁵

There is evidence as to the individual who took the blood from claimant and the process she employed in drawing the sample. Beyond that, the balance of the evidence bears only upon the usual protocol employed with respect to blood samples. Mr. Legleiter explained the process involved in testing any given blood sample, but he was unable to confirm that he was the individual who tested the claimant's blood. Moreover, there is no

¹³ K.S.A. 44-501(d)(2)(F)(Furse 2000).

¹⁴ *State v. Bright*, 229 Kan. 185, 188-89, 623 P.2d 917 (1981).

¹⁵ ALJ Award (January 13, 2004) at 10.

evidence as to precisely who logged in the vials of blood, who oversaw the centrifuge process, and how the vials came to be in Mr. Legleiter's possession. Absent this sort of foundational evidence, the Board is unable to conclude that respondent has established *beyond a reasonable doubt* that the .212 test result was generated from a sample of claimant's blood. The ALJ's finding on the chain of custody as it relates to this first blood test is reversed and the Board finds that the proper chain of custody has not been shown.

For the reasons set forth above, the Board finds the first blood sample taken at Hays Medical Center is inadmissible under K.S.A. 44-501(d)(2).

II. Test No. 2 - Wesley Medical Center

Claimant arrived at Wesley Medical Center in Wichita, Kansas via helicopter at approximately 11:30 a.m. to 11:45 a.m. The blood alcohol test results (.212) were not released until after claimant left Hays, Kansas, but were relayed to the medical personnel involved in claimant's air transport transfer. By the time the helicopter landed in Wichita, the results were conveyed to the medical personnel at Wesley Medical Center.

Claimant came under the care of Dr. William Waswick, a trauma surgeon, and Dr. Satish Ponnuru, a surgical resident. While both Drs. Waswick and Ponnuru confirm that a blood alcohol test was ordered on claimant, neither can confirm who ordered the test. Dr. Ponnuru remembers very little about this patient or his care. Dr. Waswick recalls slightly more, testifying that he initially thought claimant fell asleep at the wheel and that event was the cause of his accident. Dr. Waswick also indicated that claimant told either him "or his staff" that he had consumed a 6 pack of beer at night.¹⁶ It is unclear whether claimant was referring to the night of August 6th or some other night. Dr. Waswick also testified that ordering a blood alcohol test is part of the standard operating procedure and is checked routinely in cases involving trauma.

Toya Burris, a "Senior Phlebotomist", testified that based upon the paperwork, she is the one who drew the blood sample, processed and received it, labeled it as coming from the claimant and delivered it in a biobag to the laboratory for analysis. Ms. Burris is not licensed by the State of Kansas.

The blood sample was received by Ann Chatlain, a medical technologist. Ms. Chatlain normally spins the samples on a centrifuge prior to testing. The samples are then placed in an ACA star machine for the testing procedure. Upon completion, the test results are automatically printed and reported to the patient, whose name is contained on the label affixed by the phlebotomist. Ms. Chatlain explained that as long as the bar code is correct upon the blood vial, the results will necessarily correspond to the blood. She also testified

¹⁶ Waswick Depo. at 15.

that the reagents used by the machine are premade and calibrated. The lab is not licensed or certified by the state.

The test results indicate that the blood sample was taken from claimant at 11:50 a.m. and yielded a blood alcohol level of 152.7 milligrams of alcohol per deciliter of blood (.1527 grams of alcohol per 100 milliliters of blood).

1. Probable Cause

By the time claimant had been transferred from the medical facility in Hays, Kansas, information had developed that indicated claimant may well have been intoxicated at the time of his accident. This information came in the form of a .212 blood alcohol content based upon the test performed in Hays, Kansas, on blood retrieved approximately one hour after claimant's accident, and one hour before his arrival in Wichita. In addition, claimant again appeared to hospital personnel that he had been drinking, and had been involved in a single vehicular accident. Based upon a totality of the circumstances, the Board believes these facts constitute a "quantum of evidence" which would lead one to believe that something, here intoxication and resulting impairment, is more than a possibility. Thus, the Board finds the requisite element of probable cause is met. This finding relies in part upon the knowledge of the results from first blood test, which itself is inadmissible. However, the "fruit of the poisonous tree" doctrine is a criminal, not a civil evidentiary principle.

2. Laboratory Qualifications

As was the case with Hays Medical Center, the ALJ found there was an insufficiency of evidence to establish that Wesley Medical Center had the appropriate qualifications required to satisfy K.S.A. 44-501(d)(2)(D). The Board agrees. There is no evidence within the record that the laboratory housed within Wesley Medical Center was licensed or approved by the statutorily mandated agency or department. Nor is there any suggestion that the lab is one that is commonly used by state law enforcement agencies. This evidentiary failure precludes the admission of the .1527 blood alcohol test result from the second test.

3. Chain of Custody

As with the first test sample, the Board finds there is a similar lack of evidence establishing an unbroken chain of custody associated with the blood samples taken from claimant while he was at Wesley Medical Center. Both Ms. Burris and Ms. Chatlain testified as to the normal process utilized in testing blood samples taken from patients. However, Ms. Burris was unable to testify that she had, in fact, been the one to take claimant's blood, nor was Ms. Chatlain able to confirm she was the one who performed the test. The best that either of them could say was that their names were associated with the

samples. It is unclear how they knew this as there was no paperwork identified during their depositions which would explain how anyone knew these individuals were involved in the process.

Based upon the evidence contained within the record, the Board finds there is insufficient evidence upon which to conclude *beyond a reasonable doubt* that the test results were from the sample taken from the claimant. Accordingly, the ALJ's finding on this issue is reversed. The Board finds this requisite element had not been met and the .1527 blood alcohol test result is not admissible.

III. Test No. 3 - Kansas Highway Patrol

Upon claimant's arrival at Wesley Medical Center, certain vital information was placed on a white board outside the treatment room. This information included claimant's name along with a reference to "hepatitis A B C" and "BAC .212". This white board was in plain site.

Trooper Robert Taylor was the first patrolman to respond to the accident site. He did not arrive on the scene until 10:33 a.m., well after the time claimant had been transported from the site. Trooper Taylor testified that he had no suspicion of alcohol based upon the circumstances of the accident. He found no empty cans of beer, nor did he uncover any evidence of claimant driving erratically before the accident.

Trooper Taylor was unable to speak to claimant as he had been taken from the scene, so he dispatched another officer, Trooper Brent Lies, to interview claimant at the hospital in Wichita. Trooper Lies arrived at the hospital at 12:12 p.m. and went directly to the trauma room. Although Trooper Lies does not recall whether he saw the information on the white board before or after interviewing the claimant, Trooper Taylor testified that he received a call from Trooper Lies informing him of the alcohol testing results as well as the reference to Hepatitis A, B and C. Trooper Taylor said that Trooper Lies had expressed some health concerns due to the reference to Hepatitis. Moreover, because this accident involved serious injuries, it is standard operating procedure to request a blood alcohol test.

When Trooper Lies first met with claimant at 12:45 p.m., he found the claimant responsive, coherent and had no reason to believe him to be incompetent. Trooper Lies testified that claimant admitting drinking the night before his accident, and that he had lost control of the drilling rig when a tire went off the road and on to the shoulder. Following normal protocol, Trooper Lies gave claimant the normal cautionary warnings required by law¹⁷ and claimant consented to have his blood drawn and tested.

¹⁷ K.S.A. 8-1001.

The blood and urine samples were drawn by a registered nurse, Troy Enneking, employed by Wesley Medical Center, while under the direction and in the presence of Trooper Lies. The urine sample was collected from the claimant's catheter at 1:05 p.m. and the blood sample was drawn from the claimant's right foot at 1:17 p.m. The samples were taken into custody by Trooper Lies, labeled, initialed, dated and placed in a ziplock bag and then into a manilla envelope and sealed with evidence tape. The samples remained in his custody and control until he finished his investigation.

Trooper Lies testified that the samples were kept in either his trunk or his locker until such time as he could deliver them to the Sedgwick County Regional Forensic Science Center the following day. He has sole access to the trunk of his vehicle and other than his supervisor, he has sole access to his evidence locker.

On August 29, Trooper Lies received the returned samples along with test results and a signed sheet indicating the names of the individuals who had been involved in the testing process and had handled the samples. None of the individuals who were involved in the testing process testified. The only evidence in the record is that the testing revealed a blood alcohol of 11 milligrams of alcohol per deciliter of blood (.11 grams of alcohol per 100 milliliters of blood).

1. Probable Cause

The ALJ concluded that the "exceedingly high blood alcohol level (.212)"¹⁸ provided ample probable cause for the sample requested and obtained by the Trooper. The Board agrees. Moreover, the claimant admitted consuming alcohol the night before his accident. The Trooper had no reason to distrust the claimant's statements as he appeared coherent and oriented. Thus, the claimant's statements coupled with the information on the white board, which was in plain sight, provided more than sufficient probable cause for purposes of requesting a blood sample. However, if this was a criminal proceeding the knowledge of the blood alcohol content would arguably be based upon the evidence improperly obtained and would be inadmissible under the "fruit of the poisonous tree" doctrine.

2. Collection of the Test Sample

As noted by the ALJ, the statute requires the samples to be taken and labeled contemporaneously with the events establishing probable cause, by or under the supervision of a licensed health care professional.¹⁹ The third test sample was collected by a registered nurse. While in the process of investigating the circumstances surrounding claimant's accident, the Trooper sought and received claimant's consent to have his blood

¹⁸ ALJ Award (January 13, 2004) at 10.

¹⁹ K.S.A. 44-501(d)(2)(B)(C).

tested. Trooper Lies immediately sought out the assistance of a nurse to draw the samples. All of this took place within an hour of Trooper Lies' first contact with the claimant at the hospital.

The ALJ found that a registered nurse constitutes a "licensed health care professional" and the Board agrees. There was no explicit finding that the sampling was done contemporaneously with the facts supporting probable cause, but the Board finds the ALJ's ultimate conclusion that this third test result was admissible implicitly includes such a finding. Accordingly, the ALJ's findings with respect to the elements set forth in K.S.A. 44-501(d)(2)(B-C) as it relates to the third blood sampling is affirmed.

3. Chain of Custody

As discussed previously, the language of the statute clearly mandates an unbroken chain of custody as it relates to the samples. The ALJ concluded that the respondent had established the requisite chain of custody on this third blood sample. The Board disagrees.

While Trooper Lies was present while the nurse drew the urine and the blood samples, he had them marked, processed them and delivered them to the lab the highway patrol normally uses for analysis. However, with respect to establishing the elements contained within subsections (B), (C) and (D), the record is silent as to the testing process itself. There is no evidence as to the process that was used in the lab, no testimony from those on the chain of custody receipt that would ensure that there had been no tampering or alteration during the process. Put simply, there is insufficient evidence connecting the blood sample that was taken to the test result upon which respondent relies. The statute clearly mandates evidence that establishes *beyond a reasonable doubt* that the test result is based upon the sample from the injured employee. The Board believes respondent has failed to meet this stringent evidentiary burden. Accordingly, the ALJ's finding is reversed and the .11 blood alcohol test result is not admissible.

Because none of the three test results are admissible under Kansas law, and there are no other issues in dispute, the Board concludes that claimant's surviving spouse is entitled to benefits under the Kansas Workers Compensation Act.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated January 13, 2004, is reversed and

claimant's surviving spouse is awarded benefits against respondent and its insurance carrier as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR OF Kari Hosier, claimant's surviving spouse, against the respondent, Randy's Well Service, Inc., and the insurance carrier, Liberty Mutual Insurance Co., for an accidental injury which occurred on August 7, 2002, and based on an average weekly wage of \$619.75, for compensation at the rate of \$413.19 per week from August 7, 2002.

Subject to the provisions below and K.S.A. 44-510b, payment shall be paid to Kari Hosier, the claimant's surviving spouse.

The claimant's surviving spouse is entitled to a \$40,000 lump sum amount of subject to the maximum amount of compensation payable, whereupon her rights to benefits terminate.

For the period from August 7, 2002 to September 13, 2002, Kari Hosier is entitled to \$413.19 per week for 5.43 weeks, or \$2,243.62, which is currently due and owing, less amounts previously paid. Thereafter, payment is to be made as provided above.

Notwithstanding language to the contrary, the maximum amount of compensation payable to claimant's surviving spouse shall not exceed \$250,000 and when such total amount has been paid the liability of the employer for any further compensation under K.S.A. 44-510b shall cease.

The respondent and insurance carrier are ordered to pay or reimburse claimant's surviving spouse the sum of \$2,342.08²⁰, for funeral expenses incurred and to pay \$383,850.50 in medical expenses incurred, less amounts previously paid under this claim for workers compensation benefits or amounts subject to credit pursuant to K.S.A. 44-504(b).

Pursuant to K.S.A. 44-536, the claimant's surviving spouse's contract of employment with counsel is hereby approved.

To the extent not otherwise modified herein, the Orders contained within the ALJ's Award are hereby adopted and affirmed.

²⁰ Huang Depo., Ex 2.

IT IS SO ORDERED.

Dated this _____ day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director